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OCTOBER TERM, 1978

DAVID H. LEROY, ATTORNEY GENERAL OF IDAHO AND TOM D. MCELDOWNEY, DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF IDAHO, APPELLANTS

v.

GREAT WESTERN UNITED CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Securities and Exchange Commission will address the following questions: [1]

[1] The two questions set out here comprise questions six to nine of the jurisdictional statement. Because the principal concern of the Commission is with the interaction between

1. Whether the Idaho Corporate Take-Over Law is invalid under the Commerce Clause because it creates an undue burden on interstate commerce.

2. Whether the Williams Act, 15 U.S.C. 78m(d)-78m(e), 78n(d)-78n(f), conflicts with the Idaho Corporate Take-Over Law, so that the state law is preempted under the Supremacy Clause of the Constitution.

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state and federal law, we do not address whether this suit should have been brought in a federal court in Idaho rather than one in Texas (questions one to five of the J.S.) or whether a tender offeror has standing (question 10). One of the objections raised by appellants to federal jurisdiction in this case is that *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), and similar cases preclude a federal court from exercising personal jurisdiction over defendants who do not have substantial contacts with the state in which the federal court sits. The court of appeals apparently adopted this framework for the analysis of issues under the Texas long-arm statute and Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa. The United States has argued, however, that *Shaffer* and similar cases have no application to questions about the jurisdiction of the federal courts, because the federal government constitutionally can exercise sovereignty over all of its residents. See the brief for the United States as amicus curiae in *Stafford* v. *Briggs*, cert. granted, No. 77-1546 (Jan. 15, 1979). See also *Fitzsimmons* v. *Barton*, 589 F.2d 330 (7th Cir. 1979). For the reasons stated there, the United States believes that there is no serious question about the constitutionality of the assertion of federal jurisdiction here, if a statute authorizes such personal jurisdiction. (We have furnished copies of the brief for the United States in *Stafford* to counsel for the parties in this case.)

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Securities and Exchange Commission is responsible for the administration and enforcement of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78a *et seq.*, of which the Williams Act is a significant part. Congress enacted the Williams Act in 1968 to regulate corporate acquisitions by tender offers, and the Williams Act established a requirement of full disclosure as the means of protecting investors.

This case concerns the application of the Idaho Corporate Take-Over Law, Idaho Code § 30-1501 *et seq.* (Supp. 1978), to a tender offer that is also subject to the provisions of the Williams Act. Although the Commission and the states cooperate in administering statutory systems that preserve the states' traditional regulation of securities transactions within their own borders, the Idaho Corporate Take-Over Law represents a substantial departure from the traditional form of state regulation. As the agency principally responsible for the achievement of the goal of investor protection embodied in the Williams Act, the Commission has a substantial interest in the application of any potentially conflicting state scheme for the regulation of tender offers, and also has a substantial interest in the question whether particular state securities laws with extraterritorial effects impose undue burdens on interstate commerce.

STATEMENT

1. This action arises out of efforts by Great Western United Corporation ("GWU"), a publicly-owned company incorporated in Delaware, with offices in Dallas, Texas, to purchase common stock of Sunshine Mining and Metal Co. ("Sunshine"), a Washington corporation that has its principal executive offices and more than half its assets in Idaho (J.S. App. A-4, A-5, A-31).[2] Sunshine also has a manufacturing subsidiary located in Maryland, and it engages in substantial business activities in the state of New York (J.S. App. A-4). Less than three percent of its shareholders live in Idaho (A. 36).

GWU made a national offer to purchase Sunshine securities from any owner. Because use of the channels of interstate commerce and the mails was necessary to make and carry out this offer, the Williams Act, 15 U.S.C. 78m(d)-78m(e), 78n(d)-78n(f), was applicable to GWU's efforts and to any actions taken by Sunshine with respect to GWU's offer (J.S. App. A-5).

On March 18, 1977, GWU purchased, in a privately negotiated transaction, 334,070 shares of the common stock of Sunshine, representing approximately six percent of the shares outstanding (J.S. App. A-5 n.6). On March 21, 1977, GWU filed with the

[2] The common stock of Sunshine Mining is registered with the Commission pursuant to Section 12(b) of the Securities Exchange Act, 15 U.S.C. 78*l*(b), but is not and was not registered with the State of Idaho. That stock is listed for trading on the New York Stock Exchange, and it also is traded on the Spokane Stock Exchange (J.S. App. A-4, A-86).

Securities and Exchange Commission a "Schedule 13D report" disclosing both the six percent purchase and pertinent information.[3] The Schedule 13D report was the disclosure form established by the Commission to implement the basic purpose of the Williams Act—providing "full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case." S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). It required the offeror to disclose certain types of information specified in the Commission's rules under the Williams Act, 17 C.F.R. 240.14d-1(c), and to comply with the substantive provisions of the Williams Act relating to withdrawal rights, proration and best price, 15 U.S.C. 78n(d)(5)-78n(d)(7).[4] It also was subject to the antifraud provision of the Act, 15 U.S.C. 78n(e).

[3] 15 U.S.C. 78n(d) requires any person who becomes a direct or indirect beneficial owner of more than five percent of a class of equity securities of certain issuers, by means of a tender offer, to comply with certain requirements. Under this section of the Act and Rule 14d-1 promulgated thereunder, 17 C.F.R. 240.14d-1, such persons must file a disclosure statement with the Commission. During all times here relevant, Rule 14d-1 required the disclosure statement to be filed on Schedule 13D, 17 C.F.R. 240.13D-101. The required filing of Schedule 13D pursuant to Rule 14d-1 has since been replaced by the requirement that Schedule 14D-1 be filed, 17 C.F.R. 240.14D-100.

[4] 15 U.S.C. 78n(d)(1) requires the filing to be made at the time copies of the tender offer or request or invitation for tenders are first published, sent or given to security holders of the target company. The information required to be included in the filing is specified in 15 U.S.C. 78n(d)(1) and in Rule 14d-1(a), 17 C.F.R. 240.14d-1(a).

Under the provisions of the Williams Act and the Commission's rules, GWU was free to commence its public offer on March 21, 1977, the day of the public filing and announcement.[5] GWU could not commence its offer on that day, however, because Idaho law also applied to the offer. The Idaho law was applicable to GWU's tender offer for Sunshine stock because Sunshine had a principal office in Idaho, maintained various assets within the State of Idaho, and had registered its securities with the Commission pursuant to Section 12 of the Securities Exchange Act, 15 U.S.C. 78*l*. See Idaho Code § 30-1501(6).

Idaho's law prohibited GWU from making a public tender offer until, among other things, it had: (1) submitted to the Director of the Idaho Department of Finance (who administers Idaho's takeover law), a report disclosing both GWU's intention to make a tender offer and the terms of the offer; (2) transmitted a copy of that report simultaneously to Sunshine; (3) published an advertisement describing GWU's intention to make such an offer, and the material terms of the proposed offer; (4) paid Idaho a fee that could be as high as $1,500; (5) participated in a hearing if Sunshine requested; and (6) waited until

[5] Sunshine filed suit against GWU in the United States District Court for the District of Idaho, alleging violations of the disclosure provisions of the Williams Act. (The filing of the action did not operate to stop the tender offer.) The court denied Sunshine's requests for injunctive relief, finding GWU's filings to be in compliance with federal law. *Sunshine Mining Co.* v. *Great Western United Corp.*, [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,049 (D. Ida. April 22, 1977).

the State had decided that GWU had complied with Idaho's law and until all rights to judicial review had been exhausted. Idaho's Code §§ 30-1503(1), 30-1503(2), 30-1503(4) and 30-1508.

GWU attempted to comply with the Idaho law by filing the required registration statement with the Department of Finance of that State on March 21, 1977 (J.S.. App. A-8). GWU then waited, because the tender offer could not commence until the registration statement was approved by the Director of Finance. Idaho Code § 30-1503(4). The statute established no time limit within which the Director must act.[6] On March 25, 1977, Melvin Baptie, Deputy Administrator of the Department of Finance, sent to GWU a letter commenting on the disclosure contained in the registration statement and requesting GWU to file a new registration statement providing additional disclosure (A. 77-85).[7] Appellant McEldowney, as Director of Finance, simultaneously entered an *ex parte* order delaying the effective date of GWU's proposed offer in every state where that offer would have been made (A. 86-87).

[6] There may be an implicit time limit. A hearing may be required by the Director (and must be held if requested by the board of directors of the target company). Such a hearing must be called within 20 days of the filing of the registration statement and the decision following a hearing must be reached within 30 days of the filing date. Idaho Code §§ 30-1503(4) and 30-1503(5).

[7] The Department took the position that the registration statement filed by GWU was not a "registration statement" within the meaning of Idaho Code § 30-1503(2) because it contained deficient disclosure. According to the letter, the 20-

2. On March 28, 1977, because of uncertainty about when its tender offer could go forward, GWU filed this action in the United States District Court for the Northern District of Texas, seeking an order declaring that state takeover laws,[8] insofar as they applied to an interstate cash tender offer for the purchase of securities traded on a national securities exchange: (1) placed an unconstitutional burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, and (2) were invalid under the Supremacy Clause because they intruded into an area preempted by federal regulation.[9]

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day period within which to call a hearing would not begin to run until GWU had filed a disclosure document that the Department "accepted as complete" (A. 85). The letter ended by stating that GWU could elect not to amend its material, in which event "the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977, contains sufficient disclosure" (*ibid.*).

[8] GWU also had been advised by the Attorney General of New York that New York might assert jurisdiction over the tender offer under its takeover statute, and by officials responsible for administering the Maryland takeover statute that they could not comment on the applicability of their law without a hearing (J.S. App. A-8). See Md. Corp. & Ass'ns Code Ann. § 11-901 *et seq.* (Cum. Supp. 1976); N.Y. Bus. Corp. Law § 1601 *et seq.* (McKinney Supp. 1976-1977). GWU sought relief against those statutes as well as against Idaho's law. Allegations related to the New York and Maryland laws were dismissed after it became apparent that neither State would assert jurisdiction over GWU's offer (J.S. App. A-9).

[9] Sunshine filed suit in the United States District Court for the District of Idaho, seeking to restrain GWU from continuing its tender offer until the Director of the Idaho Department of Finance, pursuant to the Idaho takeover law, conducted a full hearing on the fairness and adequacy of disclosure with respect to GWU's tender offer. That action was settled and dismissed on October 5, 1977. *Sunshine Mining Co.* v. *Great Western United Corp., supra.*

The district court granted a temporary restraining order against the application of the Idaho statute, but the court of appeals issued a stay and instructed the district court to consider the question of its jurisdiction (J.S. App. A-9). The court did so and, after a trial, both held that it had jurisdiction and enjoined the application of the state statute (*id.* at A-85 to A-125). The court reasoned that Idaho's law is invalid under the Commerce clause as an infringement on the free flow of interstate commerce and under the Supremacy Clause because it is inconsistent with the Williams Act.

A divided panel of the court of appeals affirmed (J.S. App. A-1 to A-84). After concluding that a federal court in Texas has personal jurisdiction over the Idaho state officials, that venue was proper in Texas, and that GWU has standing to challenge the application of the Idaho law, the court concluded that the state statute is both preempted by the Williams Act and invalid under the Commerce Clause.[10]

The court concluded that the Idaho law is preempted because it stands as an obstacle to the achievement of the purposes of the Williams Act. It interpreted the Williams Act as a disclosure statute, one designed

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[10] Judge Godbold, who dissented on the jurisdiction and venue issues (J.S. App. A-63 to A-83), stated that he agreed with the majority on the merits (*id.* at A-83).

to be neutral between offeror and target company. The Idaho statute, by contrast, was designed to be favorable to companies that seek to resist tender offers. The court concluded that the Williams Act relies on decisionmaking by informed investors, while the Idaho act relies on decisionmaking by the directors of the company intended to be acquired. That difference in approach placed the Idaho law in irreconcilable conflict with the federal law by hampering the ability of investors to make decisions in their own interests.

The state law is invalid under the Commerce Clause, the court reasoned, because Idaho has only a tangential relationship to interstate corporate takeovers, yet its law requires a halt to offers anywhere in the nation. The court identified a potential for conflict with other state laws that was not justified by the nature of Idaho's interest.

SUMMARY OF ARGUMENT

I.

Idaho has undertaken, through application of the Idaho Corporate Take-Over Law, Idaho Code § 30-1501 *et seq.* (Supp. 1978), to delay (and perhaps forbid) a tender offer made by a Delaware corporation, from its principal offices in Texas, to target company shareholders of whom nearly 98% reside outside of Idaho. That law is invalid under the Commerce Clause for two reasons.

1. First, the Idaho law is an attempt to exercise extraterritorial jurisdiction—jurisdiction of a scope well beyond that of traditional state "blue sky" laws,

which were preserved by the savings clause, Section 28(a), of the Securities Exchange Act, 15 U.S.C. 78bb(a). The Idaho law regulates tender offers even if the offers, acceptances, and tenders never touch Idaho's commerce, so long as the target company has certain contacts with Idaho. The law thus enables the State to deprive security holders having no relation to Idaho of opportunities to receive tender offers, and it confronts bidders, acting entirely outside of Idaho, with the choice of either risking substantial penalties by ignoring the Idaho law or accepting delay and other obstacles to success of the offer by attempting to comply with the law. Because the Commerce Clause prohibits a state from exercising laws designed to regulate conduct that occurs outside the state's borders, the law at issue here is invalid.

2. Even when a state simply regulates transactions within its borders, the regulation must not impose on interstate commerce a burden clearly excessive in relation to the local interest served. The Idaho law imposes such an excessive burden.

Appellants cite several local interests allegedly served by the Idaho law and also argue that it is a valid means of regulating the "internal affairs" of corporations with substantial assets in the State. None of the interests asserted is significantly related to or advanced by the law, and it cannot properly be characterized as "internal affairs" regulation.

The interests asserted by appellants as the primary justification of the law—protection of Idaho

investors—is not significantly promoted by the law because it can protect Idaho investors only when they hold securities of a target company with a particular economic nexus to Idaho. The law does not apply to Idaho residents who hold shares in other companies. Moreover, because it exempts from coverage any tender offer that is accepted by the board of directors of a target company, and any tender offer directed at a company with fewer than 100 stockholders, the law often does not protect Idaho shareholders even when the firm has the necessary nexus. This friendly offer exemption, together with certain provisions that enable target company management to force indefinite delays in the commencement of an offer, make the law one that "regulates the making of tender offers primarily for the benefit of management of the target company" (J.S. App. A-119 to A-120) rather than one that protects investors who reside in Idaho.

Other local interests suggested by appellants—protecting local creditors and employees from injury by third-party tender offers and fostering civic-minded management—are unrelated to the substantive provisions of the law. The standards for approving registration statements do not include consideration of potential harm to employees or creditors, and disclosure of information related to those interests cannot by expected to be of great concern to security holders —particularly those not residing in Idaho—when they confront the predominantly economic choices associated with a tender offer.

The Idaho law cannot be justified as a means of regulating the internal affairs of a target company; to the contrary, it regulates the business of bidders. In any event, Idaho has little interest in regulating the internal affairs of target companies, such as Sunshine, that are incorporated in other states. There may be some "internal affairs" issues that Idaho could properly regulate (for example, the responses of the boards of directors of Idaho-incorporated companies to tender offers), but by regulating only the relationship between security holders and the bidder, and only in the context of nonconsensual offers, the Idaho law systematically avoids such issues.

Although the interests assertedly served by the Idaho law thus are insignificant, the burdens imposed by the statute are substantial. The pre-commencement filing and waiting requirements create the potential for extended delay. This delay and uncertainty can discourage tender offers and disrupt the orderly functioning of the nation's secondary securities markets by increasing the likelihood or irregular price and volume fluctuations in the securities of both the bidder and the target company. Because the Idaho law thus imposes a substantial burden on commerce not justified by any effective promotion of legitimate state interests, it violates the Commerce Clause.

II.

A state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in federal law must yield under the Supremacy Clause to the federal statute. *Hines* v. *Davidowitz*, 312 U.S. 52, 67

(1941). Achievement of congressional purposes may sometimes require that particular conduct be left unregulated or that it be regulated only in a particular manner so as to preserve a balance among the interests of affected parties.

By enacting the Williams Act, Congress sought to protect investors confronted with tender offers. Congress selected the method of requiring the material terms of such offers to be disclosed to investors and of affording both the bidder and the management of the target company a fair opportunity to present its case to investors. This system of disclosure and investor choice is incompatible with a system that creates pre-offer delay. Congress considered and rejected proposals to require pre-commencement disclosure to the Commission and target management. To require such disclosure would be to give target management a weapon with which to delay commencement of an offer and possibly prevent its being made, even though the security holders have had no opportunity to learn of its terms. Delay gives target management the upper hand by creating uncertainty and silencing the potential bidder. It thus upsets the balance between the interests of bidders and those of target management that Congress intended to achieve.

Congress amended the Williams Act in 1970 (84 Stat. 1497); in 1976 it enacted the Hart-Scott-Rodino Antitrust Improvements Act, Section 201 of which (15 U.S.C. 18a) affects certain categories of tender offers. On both occasions Congress made it clear that it was preserving its Williams Act "commit-

[ment] to a policy of neutrality in contests for control" (*Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977)).

The Idaho law regulates tender offers in precisely the manner that Congress rejected as contrary to the welfare of investors. It imposes pre-commencement disclosure requirements that target management can use to delay or thwart tender offers and thus upsets the balance struck by Congress in the Williams Act. The Idaho Corporate Take-Over Law is therefore invalid under the Supremacy Clause.

ARGUMENT

I

THE IDAHO CORPORATE TAKE-OVER LAW IS INVALID UNDER THE COMMERCE CLAUSE

At least since the Court's decision in *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), "it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States * * *. [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.'" *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976), quoting *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

Idaho has undertaken, through application of the Idaho Corporate Take-Over Law, to delay (and

perhaps to forbid) a tender offer made by a Delaware corporation, from its principal offices in Texas, to shareholders of a "target company" [11] incorporated in Washington. Nearly 98% reside outside of Idaho. Such an assertion of state legislative authority encroaches on that "area of free trade" created by the Commerce Clause by interfering with the conduct of interstate commerce within Idaho and, more dramatically, throughout the Nation.[12]

We make two arguments, First, a law with such an extensive extraterritorial reach is invalid because, unlike traditional state securities regulation, it amounts to an assertion of extraterritorial jurisdic-

[11] We use the term "target company" to describe Sunshine because that term is used in the Idaho statute and has been adopted by the parties. The Commission's tender offer rules use the term "subject company," which the Commission prefers because it lacks the predacious connotations of "target company."

[12] Appellants incorrectly suggest (Br. 86) that the Commerce Clause holdings of the courts below are "judicially imposed requirement[s] that tender offers be solely regulated by federal law." The courts did not so hold, and we make no such argument here. The Commission believes that it may be appropriate for a state to regulate various aspects of tender offers for non-public companies incorporated within the state if most of the shareholders of the company reside within the state. A state might also promote legitimate local interests with respect to tender offers subject to Williams Act disclosure requirements (15 U.S.C. 78n(d)) by, for example, imposing liability for deceptive or fraudulent statements made to Idaho security holders in connection with such offers. It might also regulate the conduct of management of Idaho-incorporated target companies in their responses to tender offers (see note ~~80~~, *infra*).

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tion.[13] In Commerce Clause cases this Court has "frequently * * * spoken in terms of 'direct' and 'indirect' effects and burdens" on interstate commerce (*Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)), and has held that states are prohibited from directly regulating commerce in other states. *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 198-199 (1925). Second, the law is invalid because the burden on commerce is disproportionately great when compared with the law's asserted benefits.

A. The Idaho Law is Invalid Because it Directly Regulates Interstate Commerce

States traditionally have regulated intrastate securities transactions. This Court has upheld, against Commerce Clause challenges, the authority of states to enact "blue sky laws" that regulate sales of securities within their borders.[14] Congress, too, has rec-

[13] This case is therefore unlike *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978), which involved no claim of regulation of transactions outside the State, and in which the alleged burden on commerce was only that certain out-of-state oil refining companies might decline to sell gasoline in Maryland because of a requirement that they divest themselves of retail gasoline stations in that State.

[14] *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U.S. 559 (1917); *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568 (1917). The Uniform Securities Code, which has been adopted in large part by most states, regulates offers, sales and purchases within the enacting state and is thus an exercise of state power similar to that upheld by this Court in these three blue sky cases. L. Loss, *Commentary on the Uniform Securities Act* § 414(a)-(f) at 157 *et seq.* (1976 ed.).

ognized the validity and usefulness of such laws.[15]

[15] As we show at note 38, *infra*, Congress, in enacting federal securities laws, approved the continued exercise of existing state jurisdiction in this area but did not consent to extensions of state regulation to interstate transactions. To the contrary, although the House of Representatives approved a provision that indirectly would have increased the states' power to regulate securities transactions in interstate commerce, as part of the bill that was to become the Securities Act of 1933, this provision was eliminated in conference.

As passed by the House, H.R. 5480, 73d Cong., 1st Sess. (1933) contained two sections relating to state law: Section 17 (later enacted as Section 18) and Section 18(a), which was eliminated in conference. Section 18(a) would have made it a federal offense for any person to sell or deliver a security, through the mails or any means or instrumentality of interstate commerce, to any person in a state "where such sale or delivery, if it had taken place wholly within such State, Territory or the District of Columbia, would be in violation of the laws thereof relating to the sale of securities." This provision was intended to prevent evasion of state blue sky laws (H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933)) but was heavily criticized. This criticism pointed out (1) the lack of uniformity it would have created (see Remarks of Rep. Hill, 77 Cong. Rec. 2914 (1933)) and (2) the impropriety of delegating the power of Congress to regulate interstate commerce to the states (see H.R. Rep. No. 85, *supra*, at 27-29 (minority views of Rep. Merritt and Rep. Lea)). Congress enacted only the savings clause now found in Section 18 of the Securities Act of 1933, ch. 38, 48 Stat. 85:

> Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

That section, as explained in the Report of the Committee on Interstate Commerce of the House of Representatives, "carefully preserves the jurisdiction of State security commissions to regulate transactions within their own borders." H.R. Rep.

Unlike these traditional blue sky laws, the Idaho Corporate Take-Over Law does not focus on conduct within the borders of Idaho. Its major focus—as well as its major effect—is the regulation of commerce outside of Idaho.

A tender offer for securities of a widely-held, public company is quintessentially interstate commerce. The offer is communicated by use of the mails or other channels of interstate commerce to security holders across the country and abroad; securities are tendered by similar means. The offer may be made from Texas to security holders who live in New York and California. The acceptances and tenders may never touch Idaho's commerce. Yet the Idaho law operates directly on these interstate transactions, even when they take place entirely outside the State's borders. The State has asserted jurisdiction to control and regulate every "take-over offer"[16] for a

No. 85, *supra*, at 10. Section 28(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), which was enacted only a year after Section 18 of the Securities Act, is also understood to have preserved the traditional jurisdiction of state securities commissions. See I L. Loss, *Securities Regulation* 156 (1961).

[16] Subject to certain exclusions a "take-over offer" is defined to mean:

> the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition thereof the offeror would be directly or indirectly the beneficial owner of more than five percent (5%) of any class of the outstanding equity securities of the issuer.

Idaho Code § 30-1501(5).

"target company" [17] with facilities in Idaho. The State asserts that it may deprive security holders having no relation to Idaho of the valued opportunity to receive a tender offer. The State's law gives bidders, acting entirely outside of Idaho, the choice of either violating Idaho law and incurring substantial risks [18] or attempting to comply with the provisions of that law while suffering the attendant delay and uncertainty.

The Idaho statute thus is an attempt to exercise extraterritorial jurisdiction. Idaho claims the right to tell a New York seller of securities, and a Texas buyer, whether and on what terms they can trade through the channels of interstate commerce. It

[17] Idaho Code § 30-1501(6) defines a "target company" as "a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a take-over offer relating to any class of its equity securities."

[18] The compulsion to comply with the Idaho law, even when the conduct concerned occurs outside of Idaho, is found in two sections of the law: § 30-1510(1), which makes failure to comply with any section a separate criminal offense, punishable by a fine of $5,000 or a prison term not to exceed three years, or both; and § 30-1506(6), which provides:

> No offeror may acquire, remove or exercise control directly or indirectly over any assets of a target company located in this state in connection with a take-over offer unless the take-over offer is effective or exempt under this chapter, except as permitted by order of the director.

should be clear that this assertion of extraterritorial power is invalid. For example, although Idaho could fix the prices at which Sunshine sells its products to Idaho residents, it could not fix the prices at which Sunshine shares shall be traded in Florida or the prices at which Sunshine may sell products to Florida residents. Compare *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50 (1922), with *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939). Cf. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). Although Idaho could establish a speed limit for Sunshine trucks travelling in Idaho, it could not set a speed limit for travel of Sunshine's trucks in Montana, no matter how great a percentage of Sunshine's assets are in Idaho. Just as a state may not place itself in economic isolation (see *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978)), so a state may not claim to dominate the rules for interstate commerce.[18a]

The law at issue in this case has a sweeping extraterritorial reach that its defenders concede and even say is necessary to its operation. (Appellants' Br. 105, 115). It is "an attempt by the State to prescribe rules under which an important part of [interstate] commerce shall be conducted." *Shafer* v. *Farmers Grain Co.*, *supra*, 268 U.S. at 201. The Commerce

[18a] The limits on a state's power to enact substantive legislation are no less precise than the limits on the jurisdiction of state courts: in either case, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer* v. *Heitner*, 433 U.S. 186, 197 (1977).

Clause precludes the application of such a statute to commerce that takes place wholly outside Idaho's borders, whether or not the interstate commerce may be said to have effects within the State. *Ibid.*[19]

B. The Idaho Law is an Impermissible Burden on Interstate Commerce Under the Test of *Pike* v. *Bruce Church, Inc.*

Even when a state simply regulates transactions within its borders, the regulation must not impose on interstate commerce a burden clearly excessive in relation to the local interest served. *Pike* v. *Bruce Church, Inc.*, *supra*; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, *supra*. Analyzed under this test, the Idaho statute is unconstitutional.

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[19] In the blue sky cases (note 14, *supra*), this Court upheld the statutes in question only after it first concluded that they imposed indirect or incidental, rather than direct, burdens on interstate commerce. *E.g.*, *Hall* v. *Geiger-Jones Co.*, *supra*, 242 U.S. at 559. This conclusion turned on the fact that the statutes applied only to conduct within the state. As this Court observed (*id.* at 557-558) (emphasis in original):

> The provisions of the law * * * apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (§§ 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such.

Appellants assert that the Idaho statute is primarily aimed at protecting local security holders (Br. 93, 104) and that it serves subsidiary interests of the State in protecting "creditors and employees of the target company as well as * * * the corporate entity itself" (Br. 92) and in assuring the presence of civic-minded management in companies with Idaho facilities (Br. 103). Appellants also argue that the statute is justified as a form of regulating the "internal affairs" of corporations with substantial assets within the State (Br. 104-114).

As the court of appeals concluded (J.S. App. A-52 to A-62), none of these asserted local interests is significantly related to or advanced by the operation of the Idaho Corporate Take-Over Law, and the statute cannot properly be characterized as "internal affairs" regulation. Since this statute does not advance any asserted legislative objective of Idaho, it would thus be invalid even if it imposed only a slight burden on interstate commerce. See *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 624. As we show below, however, it imposed a substantial burden on interstate commerce. Furthermore, any legitimate local interests may be protected by laws imposing a lesser burden on interstate commerce.

1. *Local interests served*

a. *Local investor protection.* The Idaho statute cannot be justified as a rule that protects the interests of Idaho investors. It does not even operate when a tender offer is being made to residents of

Idaho unless the target company possesses a particular economic nexus to Idaho (see note 17, *supra*). Idaho security holders of companies lacking the required "Idaho" characteristics thus have no protection at all. Moreover, local investors may in many other cases be deprived of the law's purported benefits as a result of express exemptions from coverage for any tender offer that is the subject of a favorable recommendation by the board of directors of a target company (Idaho Code § 30-1501(5)(e)) or for any tender offer directed at a company with fewer than 100 stockholders, if made to all stockholders (Idaho Code § 30-1501(5)(d)). The failure to regulate "friendly" offers is markedly inconsistent with the professed goal of investor protection, because security holders may well be more in need of protection in the face of an uncontested offer than in a contested battle for corporate control. See *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 598 (5th Cir.), cert. denied, 419 U.S. 873 (1974).[20] These exemptions, together with a provision allowing a target company's management to delay commencement of a tender offer by requesting an administrative hearing on the proposed offer, led the district court to conclude that the Idaho statute "regulates the making of tender offers primarily for the benefit of management of the target company" (J.S. App. A-119 to A-120).[21]

[20] Federal laws regulating tender offers do not have such an exemption for friendly offers.

[21] The district court's finding that the "purpose of the Idaho takeover statute is to inhibit tender offers for the benefit of management" (J.S. App. A-118 to A-119) draws additional support from the views of academic commentators with respect to state takeover statutes generally. See, *e.g.*, E. Aranow & H. Einhorn, *Tender Offers for Corporate Control* 172 (1973); Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Texas L. Rev. 1, 26-28 (1978); Moylan, *State Regulation of Tender Offers*, 58 Marq. L. Rev. 687, 690 (1975); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1150 (1974). Appellants (Br. 94-99) and some *amici* (see, *e.g.*, Ohio Br. 7-8) argue that the state laws have not discouraged tender offers. There is, however, no practical means of testing this assertion. The observation that many tender offers have been made despite state laws tells us little about how many more would have been made absent state laws.

Although the Idaho law thus does not operate at all in many cases in which tender offers are made to Idaho residents, it is triggered in every case in which an offer is made for a company with the defined business relationship to Idaho, even though no security holders of the target company reside in Idaho.[22] Idaho would prohibit a tender offer here even if GWU restricted the offer to the nearly 98% of Sunshine's

[22] See Idaho Code §§ 30-1501(6) (definition of "target company") and 30-1503(1) ("effective" registration statement made a prerequisite for commencing a tender offer for "target company in this state"). Idaho Code § 30-1501(5)(c) exempts from the definition of "take-over offer" an offer "made to not more than ten (10) persons in this state * * *." Since this is not limited to residents of Idaho, this exemption would not be available if 10 shareholders of the target company were present in Idaho at any time during the term of a tender offer. Therefore, a prudent bidder must assume the applicability of the statute whenever the defined nexus between the target company and Idaho exists.

security holders neither residing nor found in Idaho;[23] that statute, as interpreted by the Idaho officials, also prohibits GWU from proceeding with its offer outside Idaho while going through the administrative process in Idaho.[24]

In sum, what appellants describe as the primary purpose of the law—the protection of Idaho investors—can be achieved only fortuitously, given the nature of the law's application. What appellants describe as a "necessary incident to protection of domestic shareholders" (Br. 115)—the effect of the law on investors outside of Idaho—often may be the dominant effect of the statute. And, as the court of appeals concluded, "Idaho has little reason to protect shareholders of other states" (J.S. App. A-53), many of whom might well prefer the opportunity to deal with a bidder without the delay and uncertainty created by the Idaho law.

b. *Other local interests.* Appellants also argue that the Idaho law protects local creditors and employees from injury resulting from third-party tender offers (Br. 92) and fosters civic-minded management (Br. 103). But the substantive provisions of the

[23] Idaho Code § 30-1506(1) provides that "no offeror may make a take-over offer involving a target company which is not made to all its stockholders in this state * * *."

[24] The Idaho Department of Finance, in its letter commenting on GWU's registration statement, said (A. 80): "It is our position that tenders made within and without the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code."

statute bear little relationship to these interests. The statute contains no standard by which the Director of Finance may deny approval of a registration statement if he concludes that the offer will injure the interests of creditors or employees of the target company. Nor does the statute in any way relate the approval of a registration statement to the promotion of civic-minded local management.[25] Even when a hearing is called, whether by the Director of Finance or at the instance of the board of directors of the target company, the Director may deny "registration" only if he concludes that the offeror has failed to provide the information required by the statute or if he finds that the offer would either not be made on equal terms to all security holders or would violate the Idaho blue sky law (Idaho Code § 30-1503(5)). As for the disclosure function of the statute, there is no reason to believe that security holders of the target company—especially those not residing in Idaho—will give significant consideration to local community interests when confronted with the predominantly economic choices associated with a tender offer.

[25] The statute is not confined in operation to locally-owned or locally-managed firms; it applies to any target firm with substantial assets in Idaho, including firms managed from other states. What is more, any presumption that locally-owned or managed firms are more "civic-minded" or better for Idaho in some other way comes perilously close to discrimination against interstate commerce for its own sake. The Commerce Clause precludes a state from relying on any supposed virtues of economic isolation as a justification for its statutes. *City of Philadelphia* v. *New Jersey*, *supra*.

The court of appeals concluded that the Idaho law does not advance the state interests discussed here "more than incidentally" (J.S. App. A-60). Even if it did, these interests would not justify the burden the law imposes on interstate commerce, because the State can achieve its goals more effectively by laws that directly regulate these secondary interests, and in doing so impose a lesser burden on interstate commerce. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra*, 424 U.S. at 373; *Pike* v. *Bruce Church, Inc., supra*, 397 U.S. at 142; *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951).[26]

c. *Internal affairs regulation.* Appellants and *amici* argue that the authority to enact statutes of the kind at issue here is part of a right to regulate the "internal affairs" of Sunshine and other corporations with assets in the regulating state. This argument fails because (1) the Idaho takeover statute is not designed to regulate the internal affairs of Sunshine or any other target company in Idaho (to the contrary, the statute regulates the business of GWU); and (2), as the court of appeals recognized, Idaho does

[26] As the court of appeals stated, the promotion of civic-mindedness can be achieved by conferring benefits on corporations that make exceptional contributions to local welfare, or by devising programs to involve management in community affairs (J.S. App. A-61). Similarly, local creditors can be protected by legislation regulating the creditor-debtor relationship, while local employees can be protected through the enactment of labor-management laws designed to promote job security, or by health and safety laws to protect them at their place of work.

not, in any case, have a legitimate interest in regulating the internal affairs of Sunshine, because Sunshine is a corporation of the State of Washington and many other target corporations also are likely to be foreign corporations (J.S. App. 46 n.53).

The "internal affairs doctrine" pertains to issues peculiar to the relations among or between the corporation and its current officers, directors and shareholders. Some state usually has the authority to regulate this relationship. Only one state should have this authority, because otherwise a corporation could be faced with conflicting demands.[27] This rationale does not apply to the relationship between shareholders and third parties, such as those existing in the con-

[27] Appellants wrongly suggest that any state law deemed to relate to the internal affairs of a corporation is invulnerable to a Commerce Clause challenge regardless of the burden it imposes on interstate commerce (Br. 105). The "internal affairs doctrine" is a conflict of laws concept based on a recognition that a corporation would be greatly hampered in conducting business affairs in more than one state if by doing so it subjected itself to multiple and possibly inconsistent laws governing its internal relationships and processes. *Restatement (Second) of Conflict of Laws* § 302, comment (b) at 307-308 (1971). The doctrine thus furthers the same principles of free trade that underlie the Commerce Clause by facilitating the doing of interstate or multi-state business by corporations. Indeed, it has been suggested that the Commerce Clause itself supplies a suitable rationale for requiring the choice of a single state's law to govern those aspects of the internal workings of a corporation that demand a uniform resolution regardless of the place of the forum. See Horowitz, *The Commerce Clause As A Limitation On State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806, 814 (1971).

text of a tender offer.[28] The Idaho law focuses primarily on the regulation of the relationship between shareholders and bidders and, therefore, does not fall within the "internal affairs doctrine." While there may well be "internal affairs" issues related to some tender offers that could be regulated by some state,[29] none of these issues is addressed by the Idaho law. Indeed, by regulating only the relationship between security holders and the bidder, and only in the context of "unfriendly" offers, the Idaho statute systematically avoids any issues touching on the internal affairs of the target company (see page 23, *supra*).[30]

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[28] A tender offer is, in this regard, quite unlike a proxy contest. In a proxy contest the participants are acting as shareholders who invoke the internal mechanisms of the corporation. In a tender offer, as this Court has recognized, a bidder does not ordinarily act in the capacity of a shareholder, even if the bidder happens to own some shares prior to the commencement of the offer. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 39 (1977).

[29] For example, a state might regulate the conduct of the management of the target company in responding to a tender offer by requiring the board to give careful attention to the offer and to make a written report to shareholders about the offer. Or a state might otherwise regulate the discharge of fiduciary obligations among the corporation, its officers, directors and shareholders. See, *e.g.*, *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977).

[30] The Idaho statute purposefully excludes from its purview "friendly" tender offers—although these are the ones most apt to involve a breach of a fiduciary obligation by incumbent management under state law. *Smallwood* v. *Pearl Brewing*, *supra*. Even when the Idaho statute applies, it places no duties

The Idaho statute is similar in these respects to blue sky legislation, which does not fall within the category of internal affairs regulation (*Restatement (Second) of Conflict of Laws* § 302, comment (f) at 311 (1971)), although the Idaho statute has a much broader territorial application than blue sky laws.

2. *The balance between the direct and substantial burdens on interstate commerce imposed by the Idaho statute and its purported local benefits*

The analysis to this point shows that the Idaho statute does not effectively promote any of the local interests asserted in its defense. At the same time, the statute places a substantial burden on interstate commerce.

Appellants acknowledge, and even emphasize, that the Idaho statute operates extraterritorially—that a bidder having no contact with Idaho may be subject to criminal prosecution there if it engages in securities transactions outside of Idaho. In order to avoid this threat of punishment, the offeror must comply with potentially burdensome rules. The measure of this burden is not limited, as appellants imply (Br. 118-120) to the cost of processing forms to be filed pursuant to the statute. The burden also includes the costs to prospective bidders of delays, the length of which may be difficult to estimate because of the uncertainties engendered largely by the broad discre-

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or responsibilities on the board of directors, officers or shareholders of the subject company. It does not regulate the relationship between target directors and target shareholders in any way.

tion lodged in the Director of Finance (see pages 55-57, *infra*). The statute also distorts the economic choices open to the bidder because, as its provisions demonstrate (page 24, *supra*), and appellants freely admit (Br. 95, 102), it is designed to channel tender offers for target companies into the mold of negotiated forms of corporate acquisition such as mergers or "friendly offers." This can also interfere with the opportunities of security holders to dispose of their shares in a tender offer not approved by management. And see Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 Texas L. Rev. 1, 519, 28-29 (1978). The State's effort to discourage the making of unfriendly tender offers for large corporations, frequently national in character, creates a substantial interference with interstate securities transactions.

GWU confronted costs, delay, and the associated obstacles created by Idaho when it filed its registration statement on March 21, 1977. Idaho's law was not GWU's only problem. It also was forced to contend with the laws of New York and Maryland, both of which arguably applied to the proposed tender offer.[31] The takeover laws of those States, like the

[31] N.Y. Bus. Corp. Law §§ 1601-1613 (McKinney Supp. 1976-1977); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to 11-908 (Cum. Supp. 1978). Subsequent events have shown that there was, in fact, a real possibility that the laws of more than one state could be invoked. In response to a second tender offer by GWU (through its successor in interest, Hunt International Resources Corp.) for the remaining shares of Sunshine common

Idaho statute, apply to tender offers throughout the country. The multiplicity of mandatory regulations not only compounded GWU's practical problem of obtaining approval for its tender offer but also raised a possibility of having to meet inconsistent state law requirements. For instance, GWU "was concerned that the advance publication of a tender offer required by Idaho law would violate New York's prohibition of publication" (J.S. App. A-56). The spectre of such inconsistent requirements never materialized in this case, because New York and Maryland ultimately disclaimed jurisdiction.[32] The disclaimers here, however, do not remove the burdensome character of the potential application of a multiplicity of laws. As one commentator has observed:

> Even though the statutes governing a given takeover are few in number, there are many possibilities for conflict. The waiting periods vary, as do disclosure and hearing requirements. Standards of approval for the offer itself also differ. The opportunities for delay in one state could spell defeat for a tender offer made to shareholders in other states whose statutes have different provisions. It has been suggested that these burdens will disappear when states coordi-

stock, Sunshine obtained a restraining order from a Maryland state court, based on an alleged violation of the Maryland takeover statute. This action subsequently was removed to the federal district court in Baltimore and thereafter dismissed by stipulation. *Sunshine Mining and Metal Co.* v. *Hunt International Resources Corp.*, C.A. No. M-79-502 (D. Md., dismissed April 9, 1979).

[32] But see note 8, *supra*.

> nate their efforts and when conflicts of law principles are applied. State coordination is not guaranteed and conflicts of law principles will not preliminarily restrict the number of statutes with which an offeror must comply.

Note, 28 Case W. Res. L. Rev. 955, 1003-1004 (1978).

Finally, the pre-commencement filing and waiting procedures of the Idaho statute can disrupt the orderly functioning of another important part of interstate commerce—the nation's secondary securities markets. This results from the fact that the Idaho statute, like other state takeover laws, requires bidders publicly to announce the terms of their proposed offer at the time of the filing of the registration statement. In the pre-commencement period, the bidder may fail to win approval from the state officials or may be thwarted by a "friendly" offer not required to comply with the state law. Wilner & Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 10-11 (1976). This uncertainty and delay increase the likelihood of irregular price and volume fluctuations in the securities of both the bidder and the target company. *Ibid.*[33]

[33] These disruptive effects were noted by Donald Calvin, Vice-President of the New York Stock Exchange, in testimony submitted during the passage of the Ohio takeover statute. (The Ohio law has provisions similar to those of Idaho).

> While this would provide an extended period during which the Division could review the offer and entertain protests by the target company management, it would also create difficult conditions in the market for the target company's stock. During the 20-day period there could be rumors, counter-offers and rumors of counter-offers which may result in price fluctuations to the extent that the market in the stock would be disrupted. This may make it necessary for the Exchange to temporarily halt trading in the stock. * * * The impact of the Ohio law would thereby be felt by investors throughout the Nation who would be deprived of a market for the securities they hold in the Ohio company.

Statement by the New York Stock Exchange on Amend. Sub. S.B. No. 138, File No. 90 (Reg. Sess. 1969-1970), May 9, 1969, quoted by Sommer, *The Ohio Takeover Act: What Is It?*, 21 Case W. Res. L. Rev. 681, 700 (1970). Calvin gave Congress a similar explanation of the disruptive effects attending any pre-commencement review, and Congress carefully drafted the Williams Act to avoid imposing these same burdens on the national securities markets (see pages 49-50, *infra*).

The burden placed by the Idaho takeover statute on the proper functioning of the national securities markets is especially evident with respect to arbitrageurs, the professional traders who often decide the outcome of a tender offer by their decisions to buy target company securities and their disposition of the acquired shares. Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466 (1971). Arbitrageurs are important to the bidder because they tender a substantial portion of the shares in most tender offers.[34] At the same time arbitrageurs provide a market for those shareholders of the target company who desire to sell their shares in the market prior to the termination of the tender offer.

[34] It has been estimated that arbitrageurs are responsible for more than half of all shares ultimately tendered. O'Boyle, *Changing Tactics in Tender Offers*, 25 Bus. Law. 863, 866 (1970).

The important functions of arbitrageurs can be severely hindered by the pre-commencement provisions of the Idaho statute, which dramatically increase the period during which the arbitrageurs' funds are at risk. The arbitrageur begins buying when the tender offer is first anounced and assumes a significant economic risk until the shares tendered by the arbitrageurs are actually accepted by the offeror. Under the Williams Act, the arbitrageur is at risk only between the commencement and termination of the offer, which is generally defined in advance by the offeror. Under the Idaho statute, the risk-taking for the arbitrageur begins prior to the commencement of the offer and may include an indefinite period of delay—complicated by great uncertainty about whether an offer will ever be made. Thus, by artifically magnifying the economic risks of arbitrageurs, the focal points of trading activity during the tender offers, the Idaho statute substantially distorts the free interplay of buying and selling interests in the national markets for the securities of bidders and target companies. Because the Idaho Corporate Take-Over Law thus imposes a substantial burden on commerce not justified by any effective promotion of legitimate state interests, it cannot survive challenge under the Commerce Clause. *City of Philadelphia* v. *New Jersey, supra; Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra; Pike* v. *Bruce Church, Inc., supra.*

II

THE WILLIAMS ACT PREEMPTS THE IDAHO CORPORATE TAKE-OVER LAW

A. Federal Law Preempts Any Inconsistent State Law

The arguments we have made above demonstrate that the Idaho statute cannot constitutionally operate, as it does, to hinder interstate commerce. In our view, application of the Idaho law also is forbidden by the Supremacy Clause in light of the conflict between the Idaho law and the Williams Act.[35]

A state law is preempted if Congress has foreclosed all legislation by states concerning the particular subject matter. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978). If Congress has not entirely occupied the field, a state law nevertheless cannot stand if there is a conflict between state and federal law. *Id.* at 158. See also *Hisquierdo* v. *Hisquierdo*, No. 77-533 (Jan. 22, 1979), slip op. 9-18; *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). Whether there is such a conflict depends on the outcome of the two inquiries:

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility * * *," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an

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[35] The arguments based on the Williams Act and the Supremacy Clause, if accepted by the Court, demonstrate the invalidity of the Idaho statute even if the Court disagrees with our contentions under the Commerce Clause.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing Co.*, *supra* at 526, 540-541. Accord, *De Canas* v. *Bica*, 424 U.S. 351, 363 (1976).

Ray v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 158.

We do not here contend and the court of appeals did not hold that the federal government has occupied the entire field of securities regulation.[36] Congress has approved concurrent regulation of many types of securities transactions by federal and state governments.[37] Thus, appellants' discussion and distinction of cases setting out a "test for occupation of the field" (Br. 70, 72-74) are irrelevant. Congress has not, however, authorized state regulation of securities transactions when that regulation undermines federal law. Quite the contrary. Section 28

[36] Appellants thus err in arguing that a state law is preempted only when there is "a practical impossibility of compliance with federal law as a result of the state incursion into the regulated field" (Br. 24). They also err in contending that the Commissioner has interpreted the Court's decisions in this way (Br. 68 n. 95). They rely on two releases issued under the Investment Advisers Act. But these releases, as the court of appeals observed, "only note in passing that state requirements not in conflict with federal law are valid" and "do not define 'conflict' " (J.S. App. A-38 n. 41).

[37] See Section 18 of the Securities Act of 1933, 15 U.S.C. 77r; Section 222 of the Investment Advisors Act of 1940, 15 U.S.C. 80b-18a; Section 50 of the Investment Company Act of 1940, 15 U.S.C. 80a-49; Section 21 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79(u); Section 326 of the Trust Indenture Act of 1939, 15 U.S.C. 77zzz.

(a) of the Securities Exchange Act, 15 U.S.C. 78bb(a), unmistakably bars any state from enacting a law that conflicts with either the Act "or the rules and regulations thereunder."[38] The question here thus is whether the Idaho statute conflicts with the Williams Act by frustrating the execution of its objectives.

Achievement of the goals of a federal program sometimes depends as much on leaving particular conduct unregulated as it does on assuring effective

[38] Because the legislative history of Section 28(a) indicates that it was intended to express the principles of the Supremacy Clause, the court of appeals correctly rejected appellants' contention that the section permits state regulation that the Supremacy Clause otherwise would forbid (J.S. App. A-35 to A-37). See *Stock Exchange Practices: Hearings on S. Res. 84 (72d Cong.) and S. Res. 56, and S. Res. 97 (73d Cong.), pt. 15, National Securities Exchange Act of 1934, Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 6577 (1934) (remarks of Thomas Corcoran, spokesman for the draftsmen of the bill). In any event, appellants appear to have abandoned this contention.

Moreover, as the court of appeals also observed (J.S. App. A-36 n.39), it is doubtful that Section 28(a) operates to save relatively recent laws—such as the Idaho statute here—with an unprecedented extraterritorial reach. As part of the original Securities Exchange Act, Section 28(a)—titled "Effect on Existing Law"—was designed to preserve the traditional jurisdiction under state blue sky laws. As we explain *infra*, at note 58, the Williams Act was incorporated into the Securities Exchange Act at a time when none of the state takeover statutes had been enforced, although one such statute had been passed. As the court of appeals reasoned (J.S. App. A-36 n.39): "[W]hen subsequent state legislation is not of substantially the same character as the laws Congress intended to save, the savings clause may not save the subsequent state laws."

enforcement of the provisions regulating other conduct. The congressional plan may include an important role for unfettered private decisionmaking. In such cases, both what the law requires and what it leaves alone may be essential to success of the regulatory strategy. This is, of course, especially clear when the legislative history of a federal statute contains express indications of a congressional intent to create a balance between the interests of affected parties and express rejections of proposals for imposing or extending particular requirements or restrictions. A state law that disturbs the congressionally selected balance among the interested groups by imposing more extensive or restrictive requirements obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also *New York Central R.R.* v. *Winfield*, 244 U.S. 147, 153 (1917).

Thus in *Goldstein* v. *California*, 412 U.S. 546 (1973), on which appellants rely (Br. 71-73), this Court distinguished the potential threat to congressional objectives posed by state laws on record piracy —a matter subject to the federal copyright power but not included in the regulatory scheme of the copyright laws—from the threat that state laws restricting the copying of mechanical configurations might pose to federal patent laws on that matter. As the Court explained regarding the latter (*id.* at 569-570):

> In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution.

See also *Ray* v. *Atlantic Richfield Co.*, *supra*, 435 U.S. at 178; *Aronson* v. *Quick Point Pencil Co.*, No. 77-1413 (Feb. 28, 1979).[39]

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[39] *New York Telephone Co.* v. *New York State Department of Labor*, No. 77-961 (March 21, 1979), also follows this approach. This Court affirmed a judgment that a New York law authorizing the payment of unemployment compensation to striking employees is not preempted by the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, even though the law "alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process" (*New York Telephone Co.* v. *New York State Department of Labor*, 566 F.2d 388, 390 (2d Cir. 1977)). Nonetheless, all of the opinions written in the case accepted the proposition that a state law directly regulating the collective bargaining relationship would necessarily yield, under the Supremacy Clause, to the National Labor Relations Act if enforcement of the law would disturb the balance struck by Con-

As we show below, the Idaho Corporate Take-Over Law disturbs a balance struck by Congress in the Williams Act. The Idaho law embodies a regulatory approach that favors the interests of the management of target companies and imposes particular requirements that Congress deliberately rejected as being inconsistent with its aim of protecting investors. The Idaho law therefore obstructs the accomplishment of Congress' objectives.

B. The Williams Act Protects Investors by a Neutral Disclosure Scheme that Does Not Impose Delays Before the Commencement of a Tender Offer

In adding the Williams Act provisions to the Securities Exchange Act of 1934, Congress sought to ensure that shareholders confronted by tender offers would not be required to make investment deci-

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gress and Congress had not expressly indicated its willingness to tolerate such interference with its policy.

Appellants cite (Br. 72-76) certain decisions of this Court sustaining state laws in the face of Supremacy Clause challenges and suggest that the test as applied in those cases would require the same result here. But none of those cases—(*Kewanee Oil Co.* v. *Bicron*, 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973); *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132 (1963)—concerned federal and state statutory schemes with antagonistic strategies for achieving what was ostensibly the same purpose. (In *Merrill Lynch, supra*, 414 U.S. at 140, the Court expressly found that the state law in question produced no "interference with the federal regulatory scheme.") Rather, as in *Aronson, supra*, federal and state programs either were complementary (see also *DeCanas* v. *Bica*, 424 U.S. 351 (1976)) or were concerned with different subjects.

sions without adequate information. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975); S. Rep. No. 550, 90th Cong., 1st Sess. 1 (1967) ("1967 Senate Report").[40] Congress did not, however, seek to discourage the making of tender offers, for it recognized that such offers can serve "a useful purpose in providing a check on entrenched but inefficient management." 1967 Senate Report at 3.[41]

To achieve its goal of protecting investors without depriving them of the opportunity to benefit from

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[40] The provisions and background of the Williams Act are extensively discussed in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 19-33 (1977). References to the Act's purpose of protecting investors, on which the Court focused, can be found throughout the legislative history of the Williams Act. See, *e.g., Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 2, 15, 16, 42, 43, 107 (1967) ("1967 Senate Hearings").

[41] See also the following colloquy between Senator Javits and Senator Williams concerning the bill (S. 510) that became the Williams Act:

> Mr. JAVITS: One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> Mr. WILLIAMS of New Jersey: There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967).

tender offers, Congress struck a balance. It required that tender offers include certain types of information to aid security holders in deciding whether to sell, and it required that this information be sent to the target company's management as well as to the Commission and the target company's security holders.[42] 15 U.S.C. 78n(d). It did not, however, require that this information be publicly filed or otherwise made available to target company management before the offer could commence. Such a requirement would make it possible for the target company's management to take steps to delay the offer even before the security holders learned of its terms. Thus, as this Court observed in *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58:

> By requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission, Congress intended to do no more than give incumbent management an opportunity to express and explain its position. The Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts.

The Williams Act was carefully devised to avoid "tipping the balance of regulation either in favor of

[42] If a bidder's initial disclosure is inadequate, the Commission can ask the bidder to republish its offer with fuller disclosure, and it has done so in a number of cases. See, *e.g.*, the Commissioner's public file (5-file) for the following tender offers: 5- Thompson Industries, Ltd.; 5- Detroit International Bridge; 5- Flying Dragon Oil Corp.

management or in favor of the person making the takeover bid" and was designed to protect investors by ensuring that "the offeror and management [each enjoys an] equal opportunity to fairly present [its] case." 1967 Senate Report at 3; H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968) ("1968 House Report"). The connection between this even-handed approach toward regulating tender offers and the Act's purpose of protecting investors is demonstrated by the fact that the approach is explained in the section entitled "Protection of Investors" in each report. *Ibid.* This Court has recognized that "Congress was indeed committed to a policy of neutrality in contests for control" (*Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 29 (1977)).

Congress decided that disclosure, coupled with neutrality between bidders and target company management, would afford to investors the best combination of protection against uninformed decisions and opportunity to realize profits. The Williams Act plan permits investors to decide, even at the expense of target management. The Idaho Corporate Take-Over Law, by contrast, is a scheme of tender offer regulation that favors target company management, most notably through pre-commencement disclosure provisions of the sort Congress expressly rejected and through an exemption for "friendly offers." It permits target company management to decide even at the expense of investors. Congress had a particular conception of how tender offers should operate, and the Idaho law interferes in that process.

Appellants (Br. 78-81) and *amici* (Ohio Br. 6; National Association of Insurance Commissioners (NAIC) Br. 20-23) contend that "investor protection" rather than "neutrality" is the basic purpose of the Williams Act. Therefore, they continue, states are free to enact additional "investor protection" laws even though such laws would undermine a neutrality policy.[43] This position, however, assumes that "investor protection" is an objective that can be understood and achieved without considering the means employed by the state law and the means that Congress rejected as destructive of such an objective. The legislative history of the Williams Act shows that Congress concluded that Idaho's approach to "investor protection" would undermine that very goal.

The critical date for the operation of the Williams Act is the date a tender offer is "first published or sent or given to security holders" by a bidder, *i.e.*,

[43] In making this argument, appellants rely (Br. 78-80) on a misconstruction of this Court's statement in *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 29, that neutrality "does not go either to the purpose of the legislation." But in *Piper* the Court was faced only with the question whether Congress' objectives in enacting the Williams Act permitted the court to "read into" the Act a private right of action for unsuccessful offerors (*id.* at 23). The Court merely found that the "congressional policy of 'evenhandedness' is nonprobative of the quite disparate proposition that the Williams Act was intended to confer rights for money damages upon an injured takeover bidder" (*id.* at 31). This case presents the different question whether a state law at odds with the neutrality policy obstructs the federal scheme. It involves consideration of Congress' objectives, not of the particular parties who can enforce the statute.

the date of commencement of an offer.[44] It does not require any pre-offer action, and it does not delay the offer. Proposals to require pre-commencement disclosure by a bidder of matters pertaining to a tender offer were hotly debated in Congress and ultimately rejected.

In October 1965 Senator Williams introduced S. 2731, a bill that would have subjected tender offers to advance disclosure requirements. 111 Cong. Rec. 28259 (1965). Section 2 of S. 2731 would have required a bidder to notify the target company and to file a public statement with the Commission containing essential information at least 20 days before the bidder could commence a cash tender offer that would result in the bidder's ownership of more than five percent of a class of the target company's securities.[45] Senator Williams described S. 2731 as "designed to prevent, through appropriate disclosure, cor-

[44] The commencement of an offer, thus defined, triggers the filing, disclosure, dissemination, withdrawal, proration and "best price" provisions of Section 14(d) of the Securities Exchange Act and the rules promulgated and proposed thereunder, all of which apply to a bidder. 15 U.S.C. 78n(d)(1), 78n(d)(5)-78n(d)(7). Existing Rule 14d-1 and proposed rules 14d-2 through 14d-7 in the Commission's recently published proposed tender offer rules (Release No. 34-15548, 44 Fed. Reg. 9956 (1979)) are to the same effect.

[45] The advance filing and disclosure requirement of the bill also applied to persons acquiring more than five percent of a class of securities in transactions other than tender offers. These acquisitions are the subject of Section 13(d)(1) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1), which does not require the filing of such information until 10 days after the date of the acquisition.

porate takeovers by those interested merely in quick profits rather than legitimate operation of businesses." 112 Cong. Rec. 19003 (1966).

The bill as introduced aroused great interest at the Commission and in the business and financial community.[46] The Commission's report on S. 2731 stated: "[T]he requirement of a 20-day advance notice to the issuer and the Commission is unnecessary for the protection of security holders * * *" 112 Cong. Rec. 19005 (1966). The Commission suggested instead that a bidder be required to file a confidential statement with the Commission five days prior to commencement of the offer. Under the Commission's proposal, the statement would first be sent to the target company's management at the same time the tender offer was made to security holders. *Ibid.* The Commission's suggested revision was described by Chairman Cohen as designed to give the Commission "an opportunity to examine material to assure compliance with the law, but * * * not give an opposed management a period in which to mobilize its resources and take action against the offer, at a time when the offeror could not solicit tenders or otherwise make his case." Sowards & Mofsky, *Corporate Takeover Bids: Gap in Federal Securities Regulation*, 41 St. John's L. Rev. 499, 514 (1967) (citing M. Cohen, Address to the American Society of Corporate Secretaries, Inc., June 28, 1966).

[46] Although S. 2731 and its House counterpart, H.R. 14417, were referred to committee, no hearings on the bills were held, and neither committee voted on the legislation before the end of the 89th Congress.

A new bill, S. 510, was introduced in the 90th Congress, with a pre-commencement filing provision (Section 2(2)) like that suggested by the Commission. 1967 Senate Hearings at 7. During the Senate hearings, the Commission supported the confidential filing provision of S. 510 "since it would give the Commission an opportunity to review the statement and point out any inaccuracies or inadequacies before any soliciting material was published or sent to stockholders." 1967 Senate Hearings at 20 (testimony of Chairman Cohen). See also 1967 Senate Hearings at 184-186 (testimony of Chairman Cohen), 191-192 (testimony of Phillip Loomis). Representatives of major stock exchanges and other witnesses, however, voiced their disapproval of any pre-commencement filing with or review by the Commission.[47] Although these witnesses were concerned that leaks might occur before the tender offer was made, they also expressed concern about the potential for market disruptions (*id.* at 71) and market manipulations (*id.* at 72). One witness, Donald J. Calvin, Vice President of the New York Stock Exchange, testified (*ibid.*):

> If word of the impending offer becomes public, the price of the stock will rise toward the expected tender price. Thus, the primary inducement to stockholders—an offer to purchase their

[47] See *e.g.*, 1967 Senate Hearings at 71-76 (testimony of Donald J. Calvin), 84-85 (testimony of Philip West), 87-89 (testimony of G. Keith Funston) 98 and 105 (testimony of Ralph S. Saul), 108-111 (testimony of Robert W. Haack), 139-140 (statement of William H. Painter) 151 and 163 (testimony of Francis R. Schanck).

> shares at an attractive price above the market —is lost, and the offeror may be forced to abandon its plans or to raise the offer to a still higher price. The cost of an offer to purchase hundreds of thousands of shares might prove prohibitive if the price had to be increased only a few dollers per share.

In place of the pre-commencement filing and waiting period, these witnesses suggested a requirement that a bidder file an information statement with the Commission at the time it made its tender offer. See, *e.g.*, *id.* at 71.

In the end, Congress rejected any pre-commencement filing requirement. This legislative choice was explained in the Senate Report:

> At the hearings it was urged that this prior review was not necessary and in some cases might delay the offer when time was of the essence. In view of the authority and responsibility of the Securities and Exchange Commission to take appropriate action in the event that inadequate or misleading information is disseminated to the public to solicit acceptance of a tender offer, the bill as approved by the committee requires only that the statement be on file with the Securities and Exchange Commission at the time the tender offer is first made to the public.

1967 Senate Report at 4. When the House considered tender offer legislation in 1968, it also rejected a pre-commencement filing requirement.[48]

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[48] H.R. 14475 contained the same pre-commencement filing requirement as that in S. 510 as originally introduced. The

During deliberations on the Williams Act amendments in 1970, the House subcommittee again considered and rejected suggestions that there be pre-commencement filings for cash tender offers.[49] The House hearings included testimony and written submissions both for and against H.R. 4285, introduced by Rep. Monagan in 1969, which would have required that 30 days' advance notice of a takeover attempt be given to the Commission and the target company. See, *e.g.*, *Hearings on H.R. 4285 and S. 3431 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 7, 21, 67 (1970). The bill was not reported out of the subcommittee. S. Rep. No. 91-1125, 91st Cong., 2d

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Chairman of the Commission again testified in favor of a pre-commencement filing requirement. *Hearings on H.R. 14475 and S. 510 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 17-18 (1968). The critics spoke out against it for the same reasons given before the Senate subcommittee. See, *e.g.*, *id.* at 44-46, 50.

[49] The 1970 amendments (Pub. L. No. 91-567, 84 Stat. 1497), expanded Section 14(d), 15 U.S.C. 78n(d), to cover stock-for-stock exchange tender offers, but they left undisturbed the applicable registration statement requirement of the Securities Act of 1933, 15 U.S.C. 77c-77h. This difference in treatment reflects the fact that a bidder making an exchange offer is selling securities. Therefore an effective registration statement for the bidders is required before an exchange offer can be made.

Sess. (1970).[50] The judgment of Congress is unmistakable: pre-commencement delay is inconsistent with the program of the Williams Act.

Appellants contend (Br. 26) that whatever Congress' intention was when it passed the Williams Act, Congress itself altered the balance by enacting Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a. This is incorrect. Congress expressly recognized in passing the Hart-Scott-Rodino Act that the "basic purpose" of the Williams Act is to ensure neutrality between offerors and target companies; Congress indicated its intent to avoid undermining that purpose. H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976).[51] Rep.

[50] Two bills introduced in the 94th Congress would have amended 15 U.S.C. 78n(d)(1) to require a 60-day pre-commencement filing with the Commission. S. 2522, 94th Cong., 1st Sess. § 3 (1975); H.R. 10650, 94th Cong., 1st Sess. § 1 (1975). A third bill would have required such a filing at least 21 days prior to commencement, with contemporaneous transmission to the target company. H.R. 14317, 94th Cong., 2d Sess. § 5 (1976). None of these bills was reported out of committee. Responding to Senator Proxmire's request for comment on S. 2522, the Commission opposed the bill, concluding that it would provide incumbent management with time for defensive maneuvering, disrupt markets, and (by impairing the effectiveness of the tender offer mechanism and increasing the speculative risk of investors during the waiting period) hurt the interests of investors. Letter to Senator Proxmire from Chairman Roderick Hills, April 19, 1976, BNA Sec. Reg. and L. Rep. No. 351, A-3 (1976).

[51] The Report stated:

> [I]t is clear that this short waiting period [the 10-day period for pro ration provided by Section 14(d)(6) of the Securities Exchange Act, which applies only after a tender offer is commenced] was founded on congressional concern that a longer delay might unduly favor the target firm's incumbent management, and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period thus underscores the basic purpose of the Williams Act—to maintain a neutral policy towards cash tender offers, by avoiding lengthly [sic] delays that might discourage their chances for success.

Rodino explained to the House how the legislation bearing his name was designed to mesh with the Williams Act:

> In the case of cash tender offers, more so than in other mergers, the equities include time and the danger of undue delay. This bill in no way intends to repeal or reverse the congressional purpose underlying the 1968 Williams Act, or the 1970 amendments to that act. * * *
>
> Lengthier delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tenders give to them: Either accept the offer and thereby gain the tendered premium, or reject the offer. Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House

conferees contemplate that the courts will continue to do so.

122 Cong. Rec. H. 10293-10294 (daily ed. Sept. 16, 1976). Unlike the Idaho law, the Hart-Scott-Rodino Act regulates the acquisition of securities pursuant to a tender offer but does not affect the commencement of a tender offer. The filing and waiting period provisions of the 1976 Act must be satisfied prior to the bidder's acquisition of securities, which usually occurs at the termination of its offer. Thus, the 1976 Act does not affect the solicitation process during a tender offer; it affects only the date on which the bidder may "take-down" tendered securities. Because the 1976 legislation does not delay the commencement of a tender offer, it complements the operation of the Williams Act and does not upset its balance or authorize additional state legislation.

C. The Idaho Corporate Take-Over Law Frustrates Achievement of the Objectives of the Williams Act by Imposing Requirements Rejected by Congress as Inimical to Investor Protection

The Idaho Corporate Take-Over Law regulates tender offers in precisely the manner Congress rejected as being contrary to the welfare of investors. Once the jurisdiction of the Idaho statute is triggered, the law proscribes the commencement of any nonconsensual tender offer, either within or without the State of Idaho, until all the pre-commencement requirements of the Act have been satisfied (Idaho Code § 30-1503(1)). And, given the provisions in the statute for pre-commencement filings, mandatory

hearings, and inaction by the bidder until the offer is approved by the Idaho Director of Finance, the Idaho law creates substantial delay with respect to the commencement and prosecution of a tender offer.

The Idaho law requires a tender offeror to file a registration statement with the Director of Finance and to furnish a copy of that statement to the target company prior to the commencement of a tender offer (Idaho Code § 30-1503(1)). The Idaho statute does not prescribe a minimum or maximum waiting period between the filing of the registration statement and the commencement of a tender offer; rather, it prohibits the commencement of an offer, at any time, in any place, prior to the date the registration statement is approved by the Director of Finance. There is no requirement that the Director act on a registration statement within any particular time.[52] Prior to approving a registration statement, the Director may require the offeror to file additional information that the Director deems material to the offer (Idaho Code § 30-1503(3)).[53] The Director may summarily

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[52] Idaho Code, §§ 30-1503, 30-1503(4), and 30-1504. Section 30-1503(4) provides, in pertinent part, that "[a] takeover offer becomes effective when approved by the director." Cf. note 6, *supra*.

[53] The disclosure requirements of the Idaho law differ significantly from those of the Williams Act in some respects. Compare Idaho Code § 30-1503(2)(d) with Schedule 14D-1, 17 C.F.R. 240.14d-100. Although additional state disclosure requirements do not necessarily interfere with the federal scheme, in some cases compliance with such disclosure requirements could have the effect of obscuring the *material* disclosures in a tender offer (J.S. App. A-47). See 1967 Senate

delay the effective date of the offer if he determines that the registration statement does not provide full disclosure to offerees of all material information concerning the offer (Idaho Code § 30-1503(3)). Both of these powers were invoked by the Director in this case. Indeed, GWU was notified that the Department of Finance would not even deem its registration

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Hearings at 205 (testimony of Chairman Cohen); *Hearings on Regulations Under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers, Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 87 (1976) (testimony of Commissioner Loomis); E. Aranow, H. Einhorn & G. Berlstein, *Developments in Tender Offers for Corporate Control* at 219-220 (1977).

One specific disclosure provision of the Idaho statute—a requirement that a bidder who proposes to use borrowed funds in financing a tender offer disclose the identities of parties to the loan transaction (Idaho Code § 30-1502(1)(b))—could discourage banks from making credit available to a bidder for fear of adverse consequences of the disclosure of their role. (Although the Deputy Administrator of the Idaho Department of Finance agreed to GWU's request that the source of the funding for its offer be kept confidential (A. 81-82), he was not required to do so and there is no assurance that all such requests would be granted in the future.) The borrowed funds disclosure requirement not only has no counterpart in the federal statute or rules promulgated thereunder, but it was expressly rejected by Congress when it enacted Section 13(d)(1)(B) of the Securities Exchange Act, 15 U.S.C. 78m(d)(1)(B), made applicable to tender offers through the Williams Act. See, *e.g.*, 1967 Senate Hearings at 57-58 (testimony of Hayes); 63-64 (testimony of Cohen), 129-130 (statement of Fleischer). To implement the disclosure provisions of Section 13(d)(1)(B), the Commission has accordingly established a procedure whereby the identity of banks making loans in the ordinary course of their business to finance tender offers would not be made available to the public. Exchange Act Release No. 34-13787, 42 Fed. Reg. 38341, 38345 (1977).

statement to be "filed" until disclosure complying with the Department staff's requests was made (A. 85).

The commencement of a tender offer also may be delayed by the operation of the Idaho statute's hearing process (Idaho Code § 30-1503(5)). A pre-commencement hearing may be called by the Director if he deems it "necessary or appropriate;" such a hearing is always required if the board of directors of the target company so requests (Idaho Code § 30-1503(4)).[54] And "[i]f a hearing is called, the offer shall not become effective until registered by order of the director" (Idaho Code § 30-1503(4)).

The judgment of Congress concerning the best strategy for investor protection is frustrated by Idaho's law in several significant respects. First, the delay engendered by the state statute may have a "chilling" effect on bidders; this is antithetical to Congress' vision of an evenhanded regulatory scheme. By increasing the bidder's costs[55] the statute may cause the bidder to determine not to make a tender

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[54] The seemingly brief delays before and after the hearing provided under the statute do not mark the outer bounds of delay, because either or both of the 20- and 30-day provisions described in note 6, *supra*, may be extended if the Director so orders.

[55] For example, bidders frequently finance cash tender offers through borrowings. These loans are arranged in advance of the date of commencement and normally involve a daily financing fee. The pre-commencement delay increases the bidder's costs by requiring substantial payments to maintain the availability of the borrowed funds. See *Dart Industries* v. *Conrad*, 462 F. Supp. 1 (1978).

offer in the first instance and deprive investors of the opportunity to consider it (see 1967 Senate Report at 3). Second, the Idaho statute provides a target company with a generous degree of advance notice of a tender offer, and thus with additional time within which to take steps to combat the offer.[56] During this time the target management has the upper hand, because the offeror is forbidden from communicating its views to investors. By permitting incumbent management to call a hearing, the statute also allows the target company to control the extent of delay in commencement of an offer. Giving incumbent management the upper hand may frustrate the

[56] Among other things, such delay enables a target company to:

(1) repurchase its own securities, to make it less likely for the tender offeror to obtain control of the company;

(2) induce friendly third parties to make open market purchases of the target company's securities;

(3) announce dividend increases or stock splits;

(4) issue additional shares of stock;

(5) take steps to create an incompatibility between the target company and the tender offeror, for example, inducing possible antitrust violations should the tender offer be successful;

(6) seek to arrange a defensive merger;

(7) enter into restrictive loan agreements, with default to occur should the tender offer succeed; and

(8) institute litigation, challenging either directly or collaterally, the conduct or effect of the tender offer.

See, *e.g.*, E. Aranow and H. Einhorn, *Tender Offers for Corporate Control* 242-249, 254-258, 266-268, 274-276 (1973).

offer so that investors never receive the above-market prices the offeror was willing to pay.

The pre-commencement provisions of the Idaho statute cause the kinds of harm to investors that Congress foresaw. The pre-commencement filing is the practical commencement of a tender offer. The public nature of the pre-commencement filing disrupts markets by triggering behavior, such as arbitrageur activity, that normally accompanies a tender offer. During the pre-commencement period, security holders are confronted with a dilemma similar to that which prompted passage of the Williams Act. 1967 Senate Report at 1. While the bidder is unable to accept shares pursuant to the offer, shareholders —not knowing how long the pre-commencement period may extend or whether an offer will be made— are forced to consider selling their shares in the market. They make this investment decision without the benefit of full disclosure by the bidder.[57] Because the target company is free to disseminate any information it wants (and to withhold what it chooses to withhold), shareholders are deprived of the balanced and concurrent disclosure system Congress sought to establish in the Williams Act. Moreover, shareholders also are deprived of the Act's substantive protections. For example, Section 14(d)(7) of the Act, 15

[57] Publishing certain terms of the offer in a local newspaper and mailing a copy of the bidder's filing to the target company, as required in Idaho Code § 30-1503, might well bring the proposed offer to the attention of market professionals, such as arbitrageurs, but such actions would not be equivalent to mailing the tender offer to each shareholder.

U.S.C. 78n(d)(7), which serves to "lock in" the best price offered by a bidder, does not come into effect until the formal commencement of an offer, a formal commencement that Idaho seeks to postpone.

A scheme that can thus prevent the Williams Act from operating in the manner Congress intended cannot be saved by the claim that Idaho seeks to "protect" investors. Even if Idaho had that intent, the statute is not closely related to those goals (see pages 23-26, *supra*). Idaho's law and the Williams Act are at cross-purposes. Consequently, it is not relevant that Congress has not explicitly preempted all state takeover laws; it is enough that the state and federal schemes are incompatible. *City of Philadelphia* v. *New Jersey*, *supra*, 437 U.S. at 620-621 n.4. There certainly is no evidence that Congress approved state takeover laws; indeed there is no evidence that Congress was even aware of such laws when it enacted the Williams Act.[58] Congress thought

[58] In 1968, when the Williams Act was enacted, only Virginia had a takeover statute, and that statute had not been enforced. (Virginia's statute, Va. Code § 13.1-528, became effective on March 5, 1968 (Va. Acts 1968, c. 119); the Williams Act was enacted several months later, on July 29, 1968.) When Congress enacted the Williams Act amendments in 1970, Pub. L. No. 91-567, 84 Stat. 1497, Ohio and Nevada had passed takeover laws, but only the Ohio law had been enforced, and that occurred in the same month the amendments were enacted. Nev. Rev. Stat. § 78.376 - 78.3778 (1973), 2 CCH Blue Sky L. Rep. para. 31,151 - 31,169; Ohio Rev. Code Ann. § 1707.04.1 (Page 1977 Supp.), 2 CCH Blue Sky L. Rep. para. 38,104-1. There is no evidence in the legislative history that Congress was aware of these laws.

that it was filling a regulatory vacuum with a comprehensive and carefully balanced plan. It was not even aware of the existence of such state legislation. Compare *New York Telephone Co.* v. *New York State Dept. of Labor*, *supra* (Stevens, J.), slip op. 19-21.

In sum, Congress determined that requiring disclosure concurrent with the commencement of a tender offer is the most effective means of regulating tender offers for the protection of investors. This procedure strikes a balance between the interests of the incumbent management of target companies and the interests of bidders, and it assures shareholders the opportunity, at the critical time, to hear full and fair presentations of the case for selling to the bidder and the case for rejecting the tender offer.[59]

Senator Williams has, however, recently expressed his view on state takeover laws:

> Some of the state laws clearly interfere with the purposes and objectives of the federal legislation. Advance notice provisions, and requirements concerning the duration of offers, the pro-rata purchases of shares, and the withdrawal rights of shareholders either explicitly conflict with federal provisions on the same subjects or are obstacles to the accomplishment of objectives implicit in the federal statutes.

H. Williams, "Introduction" to E. Aranow, H. Einhorn, & G. Berlstein, *Developments in Tender Offers for Corporate Control*, *supra*, at xix.

[59] Appellants are wrong in contending (Br. 80-81) that the Commission's recently proposed tender offer rules (Release No. 34-15548, 44 Fed. Reg. 9956 (1979)) are inconsistent with this policy and adopt the approach of the Idaho law. Proposed Rule 14e-1, to which they specifically refer, would establish a minimum period of 30 business days for the dura-

Because the Idaho Corporate Take-Over Law frustrates the successful operation of this statutory policy, it must yield under the Supremacy Clause. *Ray* v. *Atlantic Richfield Co., supra; Jones* v. *Rath Packing Co., supra; Hines* v. *Davidowitz, supra.*[60]

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tion of a tender offer but would not delay its commencement. Proposed Rule 14d-6(b) would deem a bidder's public announcement through a press release, newspaper advertisement or public statement of certain material terms of a cash tender offer to commence the bidder's tender offer for purposes of Section 14(d) of the Securities Exchange Act, 15 U.S.C. 78n(d). The effect of the Commission's proposal is to trigger the operation of the Williams Act at the practical commencement of the tender offer, rather than to delay the commencement date as Idaho law provides. Indeed, adoption of proposed Rule 14d-6(b) would make it impossible for a bidder to comply with both the Commission's rule and the pre-commencement filing provisions of the Idaho law.

[60] The brief of the National Association of Insurance Commissioners, as *amicus curiae*, urges that state laws regulating tender offers for insurance companies are preserved by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). There is no need for this Court to consider the question, because Sunshine is not an insurance company. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 457 (1969); *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, No. 77-952 (Feb. 27, 1979).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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